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In the

Supreme Court of the United States

OCTOBER TERM, 1970

FIRST NATIONAL BANK OF CHICAGO, as Guardian of the Estates of AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors; AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors, by FIRST NATIONAL BANK OF CHICAGO, as Guardian of Their Estates,

Petitioners.

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Schaller Press, Inc.—Alldover 3-6200

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IN THE

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FIRST NATIONAL BANK OF CHICAGO, as Guardian of the Estates of AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors; AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors, by FIRST NATIONAL BANK OF CHICAGO, as Guardian of Their Estates,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, First National Bank of Chicago, as Guardian of the Estates of Amal Fakhri, Ahmed Fakhri, Semiramis Fakhri, Omar Fakhri and Ana Fakhri, Minors; Amal Fakhri, Ahmed Fakhri, Semiramis Fakhri, Omar Fakhri and Ana Fakhri, Minors, by First National Bank of Chicago, as Guardian of Their Estates, respectfully

pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on July 8, 1970.

Citations to Opinions Below

The Findings of Fact, Conclusions of Law, and Judgment Order of the District Court are unreported and are printed as Appendix A to this Petition. The Opinion of the United States Circuit Court of Appeals for the Seventh Circuit, dated July 8, 1970, and filed September 17, 1970, is reported, at 428 F. 2d 489 (7th Cir. 1970). The Opinion is reprinted as Appendix B to this Petition.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered July 8, 1970, Appendix B, Page 8, *infra*. Rehearing was denied on August 25, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1) Should recovery under an Airline Trip Insurance policy sold to a traveler, without explanation of its terms or opportunity to alter them and without a copy being furnished, be precluded by the existence of hypertechnical, exclusionary terms not within the reasonable expectation of the Insured?

2) Should the entry of summary judgment on behalf of a defendant insurance company be upheld where there exist issues of fact which, when resolved, may prove that plaintiff is entitled to coverage despite the policy's exclusionary provisions?

Statute Involved

28 U.S.C. Federal Rules of Civil Procedure, Rule 56 (c).

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Statement

This action was originally filed in the Circuit Court of Cook County under Case No. 64 L 22696, and was removed to the United States District Court for the Northern District of Illinois upon petition of defendant herein filed September 29, 1964. Federal jurisdiction was based on diversity of citizenship, 28 U.S.C. Sec. 1332 (a)(2). Judgment for plaintiffs was entered upon plaintiffs' motion for summary judgment in the District Court. The defendant appealed. The United States Court of Appeals for the Seventh Circuit, upon review of the District Court's decision reversed and granted defendant's Motion for Summary Judgment on July 8, 1970.

In August 1961, Mrs. Suzy Fakhri undertook a tour of certain cities and countries in Europe, North Africa and the Middle East. Pursuant to her plans for this trip, Mrs. Fakhri, on August 21, 1961, purchased a round trip air-

line ticket from Air France which set forth the following itinerary: Chicago - Paris - Beirut - London - Chicago. Mrs. Fakhri hoped to visit Rabat, Morocco, but due to the uncertainty of her husband's business plans was unable to make definite ticket arrangements for such a stop before leaving Chicago's O'Hare Airport.

With the intention of insuring her life and providing financial protection for her five infant children in the event of her accidental death, Mrs. Fakhri purchased two insurance policies; one with The Fidelity and Casualty Company of New York, and the other with Continental Casualty Company of Chicago. Both policies were in the amount of $75,000.00. Both were purchased through sales representatives of the two companies at Chicago's O'Hare Airport. Both were identical in their terms and provisions. Specifically, the premiums were the same; the name of the applicant was the same; the beneficiaries were the same; and, the destination listed on the policies was the same. This destination, listed as Beirut, Lebanon, had to be inserted into a small space on the policy. In fact, both the place of departure and destination were Chicago, as the insured purchased a round trip ticket from Chicago to Chicago. Beirut was but one of the initially ticketed stopping places.

The points of departure and destination were the only details of the trip required to be listed on the application for insurance.

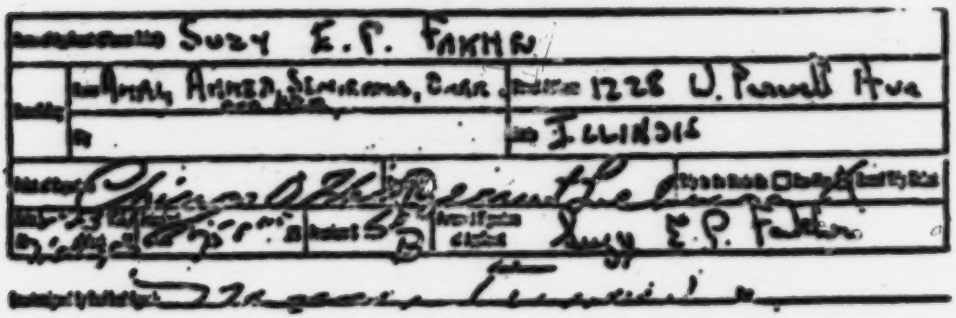
The policy identified in the Record as 8858082 stated at the top of the policy in capital letters the following:

> "DO NOT PURCHASE MORE THAN A TOTAL OF $75,000 PRINCIPAL SUM—NOR FOR TRAVEL ON NON-CERTIFICATED AIR CARRIERS. THIS POLICY COVERS ON ONE-WAY TRIP ONLY UNLESS ROUND TRIP TICKET IS PURCHASED BEFORE DEPARTURE."

Underneath this capitalised printing, in smaller letters, is the following:

> "I hereby apply to Company named below for Certificated Scheduled Air Carrier (Airline) Trip insurance to insure me on one airline trip as follows:"

The application portion of the policy was as follows:



The next portion of the policy consisted of finely drawn printed provisions covering two pages consisting of approximately 2,000 words. The entire policy is attached as Appendix C to this Petition.

Under the policy, the defendant, The Fidelity and Casualty Company of New York, contracted, among other things, to insure Mrs. Fakhri against loss of life or limb as a result of any accidental injury within the terms and conditions of the policy. On September 12, 1961, Mrs. Fakhri was killed when the aircraft on which she was riding crashed near Rabat, Morocco. The fatal flight had originated in Paris, France, and was destined for the airport at Rabat, Morocco. The death occurred on a certified, scheduled air carrier, namely Air France.

The Continental Casualty Company of Chicago promptly paid the claim of Mrs. Fakhri's beneficiaries upon application. The Fidelity and Casualty Company of New

York, under its essentially identical policy, refused to pay a similar claim made upon its policy, and this action, therefore, arose.

It is the defendant's contention that Mrs. Fakhri's flight was covered neither by the policy's "insuring clause" nor by its "substitute trip" clause. The "substitute trip" clause provides, in short, that such a trip will be covered if:

1) The original ticket is exchanged for another ticket on a scheduled air carrier covering the substituted trip;

2) The point of departure is the same as that of the original trip;

3) Some portion of the new itinerary is also covered by the original itinerary.

Mrs. Fakhri's flight clearly met conditions 2 and 3. The point of origin was and remained Chicago, and most of the original trip was also included in this substitute trip.

In other words, the defense is that by purchasing her ticket for this particular trip in Paris, from the same carrier, Air France, Mrs. Fakhri forfeited the claim of her five small children, whereas, if she had purchased a ticket in Chicago for the same trip, her children would have been paid. Or again, if she had physically exchanged the remaining portion of her ticket in Paris, her children would have been paid.

There is no dispute that Mrs. Fakhri was traveling on a regularly scheduled airline well within the time limits of her policy. She was traveling on the same carrier that originally issued her tickets in Chicago. There is no

dispute that the premium charged by the insurance company would *not* have been any greater had she obtained the tickets which included the precise trip upon which she was killed *before her departure*, even *after* she purchased the policy. Defendant never alleged otherwise.

There was no space on the application for insurance to insert this particular trip or the details of various other portions of the total voyage, which might have been arranged before or after her purchase of the policies. The application limits the information required to be listed simply to "point of departure" and "destination." The application does not require the listing of all contemplated possible voyages or trips which are to be taken by the insured within the time limit of the policy. The extent of ticketed mileage *has no relationship whatever to premium cost.* Nowhere in the capitalized printing is there any warning to the purchaser to the effect that if the purchaser carries out an additional or side trip, the policy is inapplicable. There is no contention that the defendant insurance company was subjected to any additional risk by reason of the subsequently purchased ticket covering the trip from Paris to Morocco. Likewise, whether this additional ticket was purchased or exchanged before or after her purchase of the policy, there would have been no change whatever in the form of the policy or the application.

Upon these facts the District Court entered summary judgment in favor of plaintiffs. The court recognized that contracts of insurance should be given a liberal construction so as to uphold them and accomplish the purpose for which they were made. *North Kansas City Memorial Hospital* v. *Wiley*, 385 S.W. 2d 218 (Mo. 1964).

The Court further held that Mrs. Fakhri had a right to expect insurance coverage during her total trip to

Europe and the Middle East. The District Court's decision that an exchange of tickets, allegedly required by defendant's insurance policy in order to extend coverage to "substitute trips," was not required, was supported by a number of cases cited by plaintiff. In *Steven* v. *Fidelity and Casualty Co. of New York*, 58 Cal. 2d 862, 377 P. 2d 284, 27 Cal. Rptr. 172 (1962) the Supreme Court of California had the opportunity to interpret an insurance contract identical to that issued to Mrs. Fakhri. In that case, the insured, Mr. Steven, had failed to exchange his regular airline ticket prior to taking a substituted flight. Nevertheless, the Court held that the policy covered Mr. Steven's death on such substituted flight. The Court said:

> The purpose and intent of the insured in taking out the insurance was to obtain insurance protection for the trip. . . Since his contract covered the trip, he would not contemplate a hiatus in coverage; he bargained for protection for the whole, not part of the trip. 377 P. 2d at 288.

In discussing the provision of the policy requiring an exchange of tickets in order to be covered on a substituted trip, the *Steven* Court said:

> Whether or not a passenger has exchanged his ticket *does not remotely increase the risk by the company;* furthermore, the exchange of tickets is unusual and at times impossible. Hence the enforcement of the requirement would convert a clause which seemingly extends coverage of the policy for substituted flights into one which denies coverage except in *highly unusual situations*. 377 P. 2d at 293.

Furthermore, the Court in *Steven* pointed out that this particular type of policy is usually purchased shortly before the voyage. To require a housewife and mother to

study a policy of approximately 2,000 words, with highly legalistic and hypertechnical language, in order to determine whether her five children were covered, only if she used her existing ticket in exchange for any other voyage, would be to impose an almost impossible burden upon this woman, or for that matter, any member of the passenger public. In the words of the California Supreme Court:

> To assume that Mr. Steven read the provisions, or conceivably understood them, is to rest upon hypothesis rather than fact. The insurer *instructed* the purchaser to mail the policy to the beneficiary and provided envelopes for this purpose. Like most purchasers, Mr. Steven, before boarding the plane at the very commencement of the trip, did mail the policy to the beneficiary. The company provided no duplicate. (Emphasis Supplied) 377 P. 2d at 294.

Likewise, in the case at bar, no copies of this policy or copies of any alleged exclusionary provisions or hypertechnical coverage provisions were delivered to Mrs. Fakhri. This policy invited instant mailing. Indeed, the policy was physically constructed in such a way that, upon folding, it became an envelope for its mailing.

Two Federal Court cases of particular importance in addition to the California Supreme Court's decision in *Steven* also supported the District Court's decision. *Fidelity and Casualty Co. of New York* v. *Smith*, 189 F. 2d 315 (10 Cir. 1951), and *Rosen* v. *Fidelity and Casualty Co. of New York*, 162 F. Supp. 211 (E.D.Pa. 1958).

These three cases, although differing in minor respects, were in complete accord on the issue then before the District Court. The Courts in *Steven, Smith* and *Rosen*, unequivocally held that failure to perform this meaning-

less and purely mechanical act, the exchanging of the old ticket for the new one, did not deprive the insured of the coverage of his insurance. Therefore, in effect, the Supreme Court of California, the United States Court of Appeals for the Tenth Circuit, and the United States District Court for the Eastern District of Pennsylvania all held that, notwithstanding hypertechnical, exclusionary words included in airline trip insurance policies to the contrary, the reasonable belief of the insured as to the coverage of the purchased policy should be given effect.

On appeal to the United States Court of Appeals for the Seventh Circuit in the case at bar, the Court chose to reject *Steven* v. *Fidelity and Casualty Company of New York*, 27 Cal. Rptr. 172, 377 P. 2d 284 (1962), insofar as that case held that the reasonable expectation of the insured controlled the policy's express terms. Further, the Court of Appeals below attempted to distinguish the case of *Fidelity and Casualty Company of New York* v. *Smith*, 189 F. 2d 315 (10th Cir. 1951) saying that: ". . . the court in *Fidelity and Casualty Company of New York* merely held that such a requirement would not deprive the insured of coverage where it was impossible to fulfill that requirement." Appendix B, Page 12.

The Court, in its opinion, did not, however, attempt to reconcile the *Rosen* Court's decision, interpreting the decision in *Smith*, but chose to ignore the *Rosen* decision. The Court of Appeals instead adopted the more restrictive approach of the District Court in *Best* v. *Continental Casualty Co.*, 272 F. Supp. 252 (N.D. Cal. 1966). The *Best* Court, construing an insuring clause similar to the one in issue, under circumstances substantially different from those existing in this case, said:

> The clauses are designed to assure that coverage will be extended to those flight arrangements which

> were contemplated and purchased by the insured prior to leaving the point of departure. . . . The policies clearly do not extend coverage to *side trips* purchased away from the point of departure and outside the original itinerary. 272 F. Supp. at 255 (emphasis added).

Relying upon its adoption of the *Best* decision, the Court of Appeals entered summary judgment in favor of the defendant, Fidelity and Casualty Company of New York.

Reasons for Granting the Writ

This is not just another civil case involving a defeated claim upon an insurance policy. This is a case which affects approximately two hundred million American air trips a year—in which people in good faith seek to insure themselves for the benefit of their families—only to have their families coldly deprived of insurance benefits because of tricky, camouflaged, unconscionable exclusionary clauses in their policies—copies of which policies are not given to them, the purchasers.

A recent article by Robert L. Jackson, *Federal agencies taking hard look at low-payout air-trip policies*, Chicago Sun Times, July 13, 1970, page 58, col. 1, focused upon this problem:

> • • • Today's air passenger may buy a $15,000 flight-insurance policy for 50 cents and board his airplane without second thoughts about the price.
>
> But this casual insurance buyer, whose numbers are legion this summer, is feeding a multimillion-dollar program that mainly enriches airport terminals and insurance companies, according to government investigations.
>
> The payout on air travel insurance is extremely low, they have found. Only 26 per cent of the

premiums collected over eight years have been paid out in benefits by insurance companies. The Justice Department and the Federal Trade Commission are looking into the matter.

The insurance industry is legitimately subject to attack in this area because of their unconscionable profits, vastly multiplied by their failure to pay even legitimate claims, and reliance upon outmoded, century old opinions which presume that people read these policies—which is contrary to common sense and totally unattuned to reality.

We believe that the United States Supreme Court, recognizably involved with other major problems, which confront the Court, should not cast this case aside as just another civil action.

The opinion below does not say, as it should, that Mrs. Fakhri, the purchaser, purchased not one but two policies.

The opinion below does not say that one of the companies, without even a suit, paid the full amount of its policy.

The opinion below does not say that both policies were identical. The premium was the same. The beneficiaries were the same. The insured was the same. The provisions were the same.

We respectfully ask this Court to grant *certiorari*, and take a long look at this case and what happened to the five small children of a mother killed in an international air crash, and why they were deprived of the payment of her insurance.

1) The issues presented by this case are of such great importance that it is petitioners' belief that they warrant consideration by this Court. This year alone more than

150,000,000 passengers will be carried by commercial airlines. Many of these passengers will seek to protect the financial well-being of their families through the purchase of Airline Trip Insurance. Shall their intentions to provide protection for their families be thwarted by an insurance company's reliance upon hypertechnical, exclusionary language buried in a policy of approximately 2,000 words and a sentence of 150 words? Shall such intentions be negated by the insureds' failure to perform a meaningless act — such as the physical exchange of tickets? Certainly no court would deny coverage if, contrary to the terms of an insurance policy which the insured had no opportunity to negotiate, the insured failed to "toss a pinch of salt over his left shoulder" before making an airline trip. Yet, such a requirement would have fully as much significance as the physical exchange of tickets, or the purchase of tickets for all possible stops on the travelers' itinerary before departure, as is allegedly required here.

Such contracts of insurance are prime examples of "contracts of adhesion" where the customer is required to "adhere" to the standard contract form. In recent years such contracts have been the subject of criticism and controversy. *The Wall Street Journal*, September 23, 1968, Page 1, noted the problem:

> . . . More and more lawyers and public officials are questioning the legal validity of harsh contracts and fine-print clauses, whether they appear in formidable-looking signed documents or on the back of hat-check stubs.
>
> . . . Many lawyers base their attacks on the binding nature of fine-print clauses on the premise that most aren't really contracts at all in the traditional sense of having been worked out by two parties with

> equal bargaining power. 'If the party drafting the contract knows the thing isn't going to be read, then it shouldn't be part of the bargain,' says one California attorney. 'That's like shaking hands with someone on a deal and then saying, "by the way . . ." to the other guy as you're going out the door.'

This Court recently affirmed the decision of the Second Circuit Court of Appeals in *Lisi* v. *Alitalia Airlines*, 370 F. 2d 508 (1966), affd. 390 U.S. 455 (1968), rhg. den. 391 U.S. 929 (1968). The Court there held that the notice requirements of the Warsaw Convention were not met by language, contained on an airline ticket, which was "ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else." Judge Kaufman of the Court of Appeals quoted with approval from the District Court's finding that the notice contained on an airline ticket was insufficient to bind the passenger.

> Moreover, even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon. 370 F. 2d at 514 n. 10.

Petitioners respectfully submit, although recognizing that notice was required by treaty in *Lisi*, that the exclusionary language contained in Mrs. Fakhri's insurance policy should be rejected for the same reasons. The Court in *Gray* v. *Zurich Insurance Co.*, 65 Cal. 2d 263, 419 P. 2d 168, 58 Cal. Rptr. 104 (1966) observed that:

> Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the

> adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect. Pp. 269-270, 54 Cal. Rptr. pp. 171-172, 419 P. 2d pp. 107-108.

On this basis summary judgment was denied to the insurer where the insured lost her life on an unscheduled airline flight specifically excluded from coverage by the terms of the airline trip insurance policy which she had purchased. *Lachs* v. *Fidelity and Casualty Co.*, 306 N.Y. 357, 118 N.E. 2d 555 (1954) The New York Court said, 118 N.E. 2d at 558:

> It seems to us that a jury could find that when decedent purchased her policy on an application for "Airline Trip Insurance" from a machine having in prominent lighting those same three words, before obtaining her ticket from a counter in front of which the machine stood, she was covered on her flight, since *the minds of the decedent and the company had met on that basis.* (Emphasis Supplied)

Mrs. Fakhri was surely entitled to believe that the coverage of her Airline Trip Insurance policy would extend to her entire air line trip.

Petitioners contend, therefore, that contracts, such as the one in issue, should be interpreted in the light of the reasonable and normal expectation of the parties as to the extent of the coverage. This is especially true when it is recognized that the insured probably will have neither the time to read the insurance policy nor the legal insight to understand its terms. Further, the insured is without opportunity to negotiate the terms of the policy and must "adhere" to the policy as he receives it.

Indeed, the policy provisions in this case permitted no change.

> *POLICY PROVISIONS. Entire Contract.* . . . . This policy . . . . constitutes the entire contract of insurance. . . . No agent has authority to change this policy or to waive any of its provisions.

2) The decision of the Court of Appeals below is in apparent conflict with the decision of the United States Court of Appeals of the 10th Circuit rendered in *Fidelity and Casualty Company of New York* v. *Smith*, 189 F. 2d 315 (10 Cir. 1951). In the *Smith* case, the insured purchased a round trip ticket from Albuquerque, New Mexico, to Washington, D.C. While in Washington, business required Mr. Smith to fly to Dallas before returning to Albuquerque. A round trip ticket from Washington to Dallas and return to Washington was purchased for Mr. Smith. He actually needed only a one-way ticket to Dallas and then a ticket from Dallas to Albuquerque. The mistake was not corrected. No exchange of tickets was made. While enroute from Washington to Dallas, the plane crashed and Mr. Smith was killed. Prior to his trip, he purchased a trip insurance policy from Fidelity and Casualty Co. in Albuquerque. Mr. Smith's policy contained the same "requirement" of an exchange of tickets in order for a substitute trip to be covered. The policy in the *Smith* case read in part:

> If the original transportation ticket held by the Insured is exchanged for another ticket issued by a scheduled airline, covering all or any portion of the trip specified in the original transportation ticket, this insurance shall apply to the trip for which the substituted ticket is issued in the same manner and to the same extent it would have applied had the original transportation ticket remained in effect. 189 F. 2d at 316 n. 1.

The Court's holding was clear:

> *Failure to make such an exchange could in no way affect the risk, hazard or liability.* Had the company intended to make the actual exchange of the original ticket for substituted transportation a condition of the policy determining liability, it should have been so stated in clear and explicit language. (Emphasis Supplied) 189 F. 2d at 318.

The Court continued:

> Whether Smith had exchanged his original ticket, surrendered it for cancellation, and with the proceeds purchased substituted transportation, or merely purchased substituted transportation, *could not affect the liability of the insurance company.* If he was engaged at the time of the accident on a part of the first round trip from Washington to Albuquerque, *he was within the coverage of the policy.* (Emphasis Supplied) 189 F. 2d at 318.

The *Smith* Court concluded:

> To hold under the facts as found by the court that it was necessary to actually exchange the unused portion of the return TWA ticket for other approved air line transportation for the return trip or any portion thereof would deprive the insured traveler of the beneficial provisions of the policy permitting him to return by substituted air travel and yet be protected. 189 F. 2d at 318.

In *Rosen* v. *Fidelity and Casualty Co. of New York*, 162 F. Supp. 211 (E.D.Pa. 1958), an action by the beneficiary to recover death benefits under an identical airline trip insurance policy issued by defendant, Fidelity and Casualty Company of New York, the Court held that, although there was no exchange of tickets, the insured was within the coverage of the policy under the clause providing

coverage for a substitute trip. In that case, the insured, instead of proceeding directly from Cali, Colombia to Panama, pursuant to the original itinerary of the trip covered by the policy, purchased a ticket for a trip on another scheduled air carrier from Cali to Buenaventura and return. The insured was killed while on this substitute trip.

The *Rosen* Court noted that if it were necessary for an insured to have a ticket covering the whole of his substituted trip before he left, then, of course, it would not be a substituted trip at all but would be the "first airline trip" taken by him after the purchase of the policy and would be governed by the insuring clause—making the substitute trip clause useless. In other words, the substitute trip clause could only have been meant to cover the insured on an itinerary changed by him after he left on his previously planned journey even though when injured, he was traveling on a ticket which did not cover the whole of the "first airline trip."

The only potential impediment to coverage of such a substitute trip would be the requirement that there be a physical exchange of tickets. The Court in *Rosen* perceived this problem stating:

> I can see nothing in the way of a recovery except the requirement that there be an exchange of tickets and . . . I think the *Smith* decision furnishes ample ground for holding that *this requirement is not effective to avoid liability on the policy.* (Emphasis Supplied) 162 F. Supp. at 214.

The Court further stated:

> Now, does it affect the scope of the coverage that instead of being able to go from Buenaventura to Panama and so on to New York he had to return to

> Cali and go on from there to Panama? *Certainly it did not affect the insurance company's risk to any appreciable degree and without doubt the policy would have been extended to cover such a trip for the same premium.* The insured was riding on a scheduled air carrier on a substituted trip. The point of departure was the same as his originally planned itinerary. (Emphasis Supplied) 162 F. Supp. at 214.

The Court of Appeals below asserted, however, that the decision in *Smith* was not applicable to the facts here presented. Petitioner believes, however, that the Court's language in the *Smith* decision indicates conflict with the standard of interpretation adopted by the Court below.

3) Petitioners respectfully submit that, even if the Court below correctly rejected plaintiffs' legal arguments, in favor of summary judgment, entry of summary judgment on behalf of the defendants was unwarranted. This Court restated the conditions under which summary judgment would be an appropriate remedy in *Poller* v. *Columbia Broadcasting System, Inc., et al,* 368 U.S. 464, 467 (1962).

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that (except as to the amount of damages) there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), Fed. Rules Civ. Proc. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, ... (and where) no genuine issue remains for trial . . . (for) the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

The Court below demonstrates in its opinion the presence of factual questions in Appendix B, at Pp. 11-12. The Appellate Court states the following:

> The record before us shows that at the time Mrs. Fakhri journeyed to meet her husband in Paris she had departed from her originally scheduled itinerary. The record *strongly suggests* that there was a *high probability* for further travel aside from the original itinerary after the trip to Morocco. The deposition testimony of the decedent's sister, Bridget Waltmann, and the decedent's mother, Suzanne Hogan, *suggests* that Mrs. Fakhri contemplated return trips with her husband to Beirut and to London before returning to Chicago. The demands of her husband's business and a desire to visit further with relatives were *among the factors motivating the planning* of additional travel. *Mrs. Fakhri still retained the London to Chicago portion of her ticket.*
>
> There is *nothing in the record* to indicate that the decision to return to Chicago had been made when Mrs. Fakhri purchased her one-way Air France ticket from Paris to Morocco (Emphasis Supplied.)

Additionally, in oral argument, Judge Cummings in the Court of Appeals below inquired of both counsel as to whether "deviation" was not a question of fact. The trial court was of the opinion that the deviation in this instance was so slight as to permit judgment for plaintiffs as a matter of law.

Another insurance company, within a very short time after the occurrence and on terms virtually identical to defendant's policy on all material points, paid the policy limits upon the mere filing of a claim. This would seem to indicate, if plaintiff is not entitled to summary judgment, that substantial questions of fact must exist.

The petitioners respectfully assert that the Appellate Court's entry of summary judgment in favor of defendant was inappropriate in view of its express recognition that factual questions were present. The Appellate Court's opinion indicated clearly that it considered the factual questions to be both material and unsettled. The entrance of summary judgment under such circumstances is inconsistent with decisions of this Court. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Poller* v. *Columbia Broadcasting System, Inc., et al.*, 368 U.S. 464 (1962); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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JOHN J. KENNELLY
111 West Washington Street
Chicago, Illinois 60602
FR 2-5464
Attorneys for Petitioners.

JOHN J. KENNELLY
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Of Counsel

APPENDICES

Appendix A.1

In the United States District Court
For The Northern District Of Illinois
Eastern Division

First National Bank of Chicago, as Guardian of the Estates of Amal Fakhri, Ahmed Fakhri, Semiramis Fakhri, Omar Fakhri and Aza Fakhri, Minors; Amal Fakhri, Ahmed Fakhri, Semiramis Fakhri, Omar Fakhri and Aza Fakhri, Minors by First National Bank of Chicago, as Guardian of Their Estates, Plaintiffs, vs. The Fidelity and Casualty Company of New York, a corporation, Defendant.	No. 64 C 1646

JUDGMENT ORDER

This case having been heard upon motion for summary judgment of plaintiffs and motion for summary judgment of defendant, and the Court having considered briefs, affidavits and all pleadings filed herein;

It Is Ordered And Adjudged:

Plaintiffs, First National Bank of Chicago, as Guardian of the Estates of Amal Fakhri, Ahmed Fakhri, Semiramis Fakhri, Omar Fakhri and Aza Fakhri, Minors; Amal Fakhri, Ahmed Fakhri, Semiramis Fakhri, Omar Fakhri and Aza Fakhri, Minors, by First National Bank of Chicago, as Guardian of their Estates, shall have and recover from The Fidelity and Casualty Company of New York, a corporation, $75,000.00, together with interest at 5% from September 12, 1961, and $18,750.00 for attorneys' fees of plaintiffs.

Enter:

J. S. Perry
Judge

2-14-69

Appendix A.2

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

FIRST NATIONAL BANK OF CHICAGO, as Guardian of the Estates of AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors; AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors by FIRST NATIONAL BANK OF CHICAGO, as Guardian of Their Estates, Plaintiffs, vs. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, Defendant.	No. 64 C 1646

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FINDINGS OF FACT

1. This Court has jurisdiction of the subject matter and of the parties.

2. Prior to undertaking a trip to Europe and the Near East with her husband, Suzy Fakhri purchased one policy of insurance with defendant, The Fidelity and Casualty Company of New York, Policy No. 8858083, with a face value of $75,000.00. A copy of the policy is in the record in this case and is incorporated by reference.

3. Suzy Fakhri, prior to her death, lived at 1228 West Farwell Avenue, Chicago, Illinois, with her husband, Subhi Fakhri, and their five children: Amal Fakhri, age 11, Ahmed Fakhri, age 9, Semiramis Fakhri, age 6, Omar Fakhri, age 3, and Aza Fakhri, age 8 months. Said children were and are the beneficiaries of said policy.

4. Prior to her departure from O'Hare Field in Chicago, Illinois, an airline ticket was purchased from Air

France with several stops in Europe and the Mid East. This ticket is in the record and is incorporated by reference in these Findings of Fact.

5. Suzy Fakhri, the insured, was killed while a passenger in an Air France commercial, scheduled aircraft, at or near Rabat, Morocco, on September 12, 1961, while on a flight from Paris, France, to Rabat, Morocco.

6. On the application for insurance which is in the record and which is incorporated by reference, only the origin and the furthest destination of the insured, Beirut, Lebanon, were required to be inserted.

7. Prior to her death, Suzy Fakhri had used those portions of her total ticket consisting of Chicago to Paris to Beirut to London, but had not used the portion from London to Chicago.

8. Prior to departure, Suzy Fakhri purchased another policy of insurance with Continental Casualty Company for $75,000.00. Said company paid said $75,000.00 shortly after the death of said insured.

9. The application for insurance contains no space to insert all or even some of the contemplated points of destination and departure but provides only that the farthest point of destination should be included. The farthest point of destination was Beirut, Lebanon, which was written on the application.

CONCLUSIONS OF LAW

1. Insurance policies should be liberally construed in the favor of the insured and strictly against the insurer. When policy provisions are capable of two constructions, the interpretation most favorable to the insured will be adopted. A fundamental law of construction of insurance contracts is that all uncertainties should be resolved in favor of the insured, and a policy should be construed to the end that beneficiaries will not be deprived of the benefit of insurance. This Court finds and concludes that

an ordinary person, purchasing such insurance would and should be entitled to reasonably expect that all trips which occurred on scheduled, certificated airlines during the total trip would be included. The trip from Paris to Rabat, Morocco, a destination of about 1,300 miles, constituted a relatively small portion of the trip. The fact that the insured did not physically exchange the remaining portion of her ticket for this trip is no defense to the defendant. The trip from Paris to Rabat occurred within the time limit of the policy.

2. Mrs. Fakhri had a right to expect insurance coverage for her children during her total trip in Europe and the Mid East. There would have been no changes in the premium charge if the tickets had included the Paris to Casablanca voyage when Mrs. Fakhri purchased her insurance. The Court takes notice of well-known facts, namely, that when a person buys insurance either through a machine or from a salesgirl, at an airport, the only requirement is that the form of application state the farthest destination. The form of application on the sales machine or used by salesgirls does not require and has no space for the listing of various intermediate trips. Thus, the number and destinations of ticketed trips, prior to departure, has no bearing on the premium cost, and is not in any way related to the acceptance of the insurance by a machine or salesgirl, the one and only requirement being simply to list the farthest destination. In other words, the defendant has attempted to evade payment even though it is undisputed that the number and destination of trips which might have been listed on the ticket were not inquired about and had no bearing on the amount of insurance or the premium.

3. The Court does not believe that Mrs. Fakhri, by purchasing a ticket from Air France for this segment of the voyage, in Paris, deprived the beneficiaries of coverage; that there was nothing in the application which would warn Mrs. Fakhri that the rights of her children would be forfeited simply because she did not purchase in advance all tickets for all trips during her total voyage.

4. A contract of insurance should be given a liberal construction so as to uphold it and accomplish the purpose or object for which it is made, rather than a strict, technical construction which may defeat such purpose. This is not a case of a clear, fairly worded and manifest exclusionary provision. The general object of an insurance policy of this type is to cover the passenger during all portions of the voyage, especially when the trip, which defendant asserts as a defense, is a relatively minor portion of the total voyage. Mrs. Fakhri was concerned about her children, prior to departure from Paris and had indicated a desire to return. The Court finds that this trip from Paris to Rabat in no way prevented the application of the policy. The Court finds that insured, especially in this type of insurance, are entitled to and should receive the measure of protection necessary to fulfill their reasonable expectations and neither they nor their beneficiaries should be subjected to technical encumbrances or exclusions. In the case of airline trip insurance, the company is expert in its field and its complex instruments are prepared by it unilaterally. The insured is entitled to place heavy reliance on the good faith of the insurance company. In this case, the heavy print on the face of the policy emphasized that it did not cover "travel on non-certificated air carriers." Furthermore, the application states "I hereby apply to the Company named below for Certificated Scheduled Air Carrier (airline) Trip insurance to insure me on one airline trip as follows. . ." Then there are spaces as follows: Name of Application; Beneficiaries and Address; Point of Departure; Point of Destination; Whether Trip is One Way or Round Trip; Date; Principal Sum; Premium; Signature of Applicant. In other words, the application itself did not require the listing of all interim trips but indicated that any portion of the voyage within the time limit of the policy would be covered, provided it was on a scheduled airline.

5. Decedent was killed during a trip with her husband from Paris to Rabat, which was part of the total voyage of insured in Europe and the Near Eastern areas. The

Court finds that the decedent was covered because a reasonable expectation of coverage, in the light of the application, was that her children would receive the amount of the policy if she were killed on a scheduled airline during a part of her trip to Europe and the Near East.

6. The Court has noted that another insurance company, Continental Casualty Company, paid the full amount of its policy, namely, $75,000.00, issued at the same time and place for the same premium upon the same life with the same application and the same beneficiaries. Although this action of another competing airline trip insurance company is not legally binding on this Court, this Court is entitled to consider such prompt payment by another company and has considered that fact. But entirely apart from that fact, the Court finds that defendant, Fidelity and Casualty Company of New York, has taken an arbitrary and unreasonable position. Said defendant has had the benefit of interest upon such $75,000.00 since September 12, 1961, and plaintiffs are entitled to receive, for the benefit of said children, said $75,000.00, the face amount of said policy, together with 5% interest from September 12, 1961, and additionally, $18,750.00 for its attorneys' compensation. The Court takes judicial notice of the fact that when persons purchase this type of insurance, either from a machine or a salesgirl, such applicant is provided with an envelope to mail the policy to the beneficiaries. Obviously, a person would not carry a policy of this type on an airline because if the airplane crashed, the beneficiaries would have no way of knowing of the existence of the policy. No copies of the policy are delivered to the applicant. The Court notes that this type of policy is sold either through the use of a machine and coins or by a salesgirl. An insurance company such as defendant deals with the air passenger public in contrast to the normal sale of insurance policies through brokers. This Court agrees with the language of other cases, concerning similar policies which state that the Courts are not dealing with orthodox insurance policies. The Court

finds that to deny coverage would be to deny reasonable expectations of Mrs. Fakhri.

7. Although defendant contends that the action of Continental Casualty Company is not relevant, the Court must consider the fact that another insurance company located in the same airport paid the full amount of its policy without litigation and immediately, where such policy had the same beneficiaries and the same premium. This Court considers the fact that Continental Casualty Company is a large insurance company which writes airline trip insurance and that it is manifest that the defendant in this case has sought to avoid the payment of the full amount of its policy through a hypertechnical, unwarranted, alleged defense.

8. Defendant, in its brief, concedes that a minor deviation from the original itinerary is covered, and the Court finds that this particular trip in which the insured was engaged was approximately 10% of the total initially ticketed voyage.

9. Both sides have moved for summary judgment. The Court has considered the depositions and the undisputed facts. There is no genuine issue of material fact. The mere fact that an issue has been raised by the pleadings does not give rise to a right to trial. An issue of fact must be genuine and bona fide to preclude summary judgment. This Court is mindful that summary judgment is an unusual remedy, but in this case finds that there is no genuine issue of material fact, and the plaintiffs are entitled to summary judgment. Furthermore, this Court finds that the plaintiffs should be paid 25% of the face amount of the policy for attorneys' fees, in addition to interest at 5% from September 12, 1961. Otherwise, the net effect of the action of defendant company would be that the minor children of decedent would be penalized by reason of this litigation in a case in which the Court finds defendant company's refusal to pay was without reasonable cause and vexatious.

Enter:

J. S. Perry

Judge

Appendix B.8

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 17571

FIRST NATIONAL BANK OF CHICAGO, as Guardian of the Estates of AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors; AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors, by FIRST NATIONAL BANK OF CHICAGO, as Guardian of Their Estates,

Plaintiffs-Appellees,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Defendant-Appellant.

On Appeal from a Final Order in the United States District Court for the Northern District of Illinois, Eastern Division

JULY 8, 1970

Before KNOCH and CUMMINGS, *Circuit Judges,* and STECKLER, *District Judge.*[1]

STECKLER, *District Judge.* Following the death of Suzy E. P. Fakhri resulting from an airplane crash, First National Bank of Chicago, as guardian of the estates of her minor children, sued The Fidelity and Casualty Company of New York (Fidelity) upon a policy of airline trip insurance. Fidelity refused to pay the policy benefits to the minors' estates claiming that the policy did not cover the

[1] William E. Steckler, Chief Judge of the United States District Court, Southern District of Indiana, is sitting by designation.

fatal accident. Both parties moved for summary judgment. The District Court granted plaintiffs' motion, denied defendant's motion, and entered summary judgment against Fidelity for $75,000.00, the face amount of the policy, together with interest from the date of the insured's death. The District Court also awarded plaintiffs attorneys' fees in the amount of $18,750.00. From this judgment Fidelity appeals.

On August 21, 1961, the decedent purchased from Air France a round trip airline ticket which set forth the following itinerary: Chicago-Paris-Beirut-London-Chicago. Before departing Chicago on August 23, 1961, Mrs. Fakhri purchased the policy of flight insurance. The policy covered the first one-way trip taken after the purchase of the policy, unless a round trip ticket were purchased before departure.[2] There was space on the policy to insert the insured traveler's point of departure and destination and a place to indicate whether a round trip was being taken, so that return coverage could be obtained. The policy provided that in case of a change of itinerary after the original ticket was purchased, coverage of the new itinerary would be provided if the original ticket were exchanged for a new one, the point of departure were the

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[2] The Insuring Clause of the policy provided: "The Company will pay the benefits specified below if during the term of this policy the insured suffers loss resulting directly . . . from accidental bodily injury . . . during the first one way or round airline trip taken by the insured after the purchase of this policy on Aircraft Operated by a Certificated Scheduled Air Carrier as defined below from the Point of Departure to the Destination, both shown above, and return if round trip ticket is obtained before departure, provided that at the time that the insured sustains such injury he is traveling on a transportation ticket or pass covering the whole of said airline trip, issued to him for transportation on an aircraft operated by a certificated scheduled air carrier."

same and some portion of the original itinerary were covered by the new itinerary.[3]

The undisputed facts establish that Mrs. Fakhri departed Chicago and flew, by way of Paris, France, to Beirut, Lebanon, to join her husband where she remained with him for approximately three weeks. She then flew to London, England, and upon her arrival there she entrained for Manchester, England, to visit relatives. While in Manchester Mrs. Fakhri and her sister went to visit their father in Leicester, a city about seventy-five miles away. Upon her return to Manchester, Mrs. Fakhri received a cable from her husband asking her to meet him in Paris where they would embark on a trip to Casablanca, Morocco. Mrs. Fakhri then called her mother in Chicago to inquire about her children and to ask if it were all right that she undertake the trip to North Africa with her husband instead of returning to Chicago. With her mother's encouragement she emplaned for Paris where she joined her husband and there purchased from Air France the one-way ticket for the flight to Morocco.

The primary issue presented by this appeal is whether the contract of insurance provided coverage to the plain-

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[3] The substitute trip provision of the policy provided: "In a case of a change in the itinerary of said first airline trip referred to in Section 1 above, following the issuance of this policy, the insurance afforded as set forth in Section 1 above shall no longer apply on the original itinerary but shall apply on the new itinerary in the same manner and to the same extent as it would have applied on the original itinerary, provided that (1) the transportation ticket or pass issued to the insured for said first airline trip has been exchanged for another ticket or pass issued for transportation on an aircraft operated by a certificated scheduled air carrier on the substituted trip, and (2) the Point of Departure is the same as that shown above, and (3) some portion of the trip covered by the substituted ticket is the same as that covered by the ticket or pass for the first airline trip referred to in Section 1 above."

tiffs' decedent under the circumstances of her death. Fidelity contends that the decedent was on a "side trip" which was not covered by the policy. Plaintiffs contend, and the District Court held, that notwithstanding the contract's provisions, the decedent's "reasonable expectation" of coverage was sufficient to subject Fidelity to liability.

Under Illinois law, which we are bound to follow in this case, the terms of a written contract determine the rights of parties thereto. This applies also to flight insurance contracts. See *Mutual of Omaha Insurance Co.* v. *Russell*, 402 F.2d 339 (10th Cir. 1968); *Thompson* v. *Fidelity and Casualty Company of New York*, 16 Ill. App. 2d 159, 148 N.E. 2d 9 (1958).

An insurance company has the right to limit coverage on a policy it issues and when it has done so, the plain language of the limitations must be effectuated. *Dreher* v. *Aetna Casualty & Surety Co.*, 83 Ill. App. 2d 141, 226 N.E. 2d 287 (1967); *Thompson* v. *Fidelity and Casualty Company of New York, supra; Continental Casualty Co.* v. *Phoenix Construction Co.*, 46 Cal. 2d 423, 296 P. 2d 801 (1956); *Crosse* v. *Supreme Lodge Knights and Ladies of Honor*, 254 Ill. 80, 98 N.E. 2d 261 (1912).

The District Court was in error in finding that the plaintiffs' decedent was covered by the policy simply because she reasonably expected coverage. If decedent were afforded coverage by the policy in question, then such coverage must be found within the terms of the policy. We reject *Steven* v. *Fidelity and Casualty Company of New York*, 27 Cal. Rptr. 172, 377 P. 2d 284 (1962), cited and relied on by the plaintiffs, in so far as it deems the reasonable expectation of the insured as controlling the policy's express terms.

Coverage in this case depends on whether at the time of the fatal accident decedent was on the first one-way or round trip insured by the policy.

The record before us shows that at the time Mrs. Fakhri journeyed to meet her husband in Paris she had

departed from her originally scheduled itinerary. The record strongly suggests that there was a high probability for further travel aside from the original itinerary after the trip to Morocco. The deposition testimony of the decedent's sister, Bridget Waltmann, and of the decedent's mother, Suzanne Hogan, suggests that Mrs. Fakhri contemplated return trips with her husband to Beirut and to London before returning to Chicago. The demands of her husband's business and a desire to visit further with relatives were among the factors motivating the planning of additional travel. Mrs. Fakhri still retained the London to Chicago portion of her ticket.

There is nothing in the record to indicate that the decision to return to Chicago had been made when Mrs. Fakhri purchased her one-way Air France ticket from Paris to Morocco.

At the time of Mrs. Fakhri's death she was not travelling on a ticket covering the whole of her trip as required by the insuring clause of the policy. Nor had she exchanged her original ticket for a new one as required by the substitute trip clause of the policy. When, as here, the insured abandoned the originally scheduled itinerary, the new itinerary could be brought within the policy's coverage only by the exchange of the original ticket for another ticket, some portion of the trip covered by the substituted ticket being the same as that covered by the ticket for the first airline trip. Appellees, relying on *Fidelity and Casualty Company of New York* v. *Smith*, 189 F. 2d 315 (10th Cir. 1951), contend that the exchange requirement is a meaningless act. However, the court in *Fidelity and Casualty Company of New York* merely held that such a requirement would not deprive the insured of coverage where it was impossible to fulfill that requirement. The court took no position on whether the policy would have been in force had exchange been possible. Here the decedent purchased the ticket for the fatal flight from the carrier with which she had scheduled her original itinerary; there would have been no difficulty in com-

plying with the exchange requirement. For these reasons we hold that the decision in *Fidelity and Casualty Company of New York* is not controlling.

We are in accord with the reasoning of the District Court in *Best* v. *Continental Casualty Co.*, 272 F. Supp. 252 (N.D. Cal. 1966), construing an insuring clause similar to the clause now before this court, that:

> "The . . . clauses are designed to assure that coverage will be extended to those flight arrangements which were contemplated and purchased by the insured prior to leaving the point of departure. . . . The policies clearly do not extend coverage to *side trips* purchased away from the point of departure and outside the original itinerary." 272 F. Supp. at 255. [Emphasis added.]

The District Court in the *Best* case noted, as defendant here asserts, that the purpose of these restrictive clauses is to control the number of individual flights to which the insurance extends and render them readily identifiable. Subject to the substitute trip provisions of this policy, the insurer contracts to extend coverage only to those trips scheduled, before departure, upon a ticket which covers the whole of the airline trip. Side trips are not afforded coverage.

From the undisputed facts in this case we conclude that Mrs. Fakhri was not traveling on the first insured one-way or round trip at the time of her death, but rather was on a side trip not scheduled in her original itinerary and therefore was not within the insurance policy's coverage.

The order of the District Court granting summary judgment to plaintiffs is reversed and the cause remanded with directions to enter summary judgment for the defendant, The Fidelity and Casualty Company of New York. It is unnecessary for us to consider the award of attorneys' fees to plaintiffs since they are no longer entitled to any part of them by reversal of this matter.

Appendix C.14

No. 8858082

DO NOT PURCHASE MORE THAN A TOTAL OF $75,000 PRINCIPAL SUM — NOR FOR TRAVEL ON NON-CERTIFICATED AIR CARRIERS. THIS POLICY COVERS ON ONE-WAY TRIP ONLY UNLESS ROUND TRIP TICKET IS PURCHASED BEFORE DEPARTURE.

I hereby apply to Company named below for Certificated Scheduled Air Carrier (Airline) Trip Insurance to insure me on one airline trip as follows:

Name of Applicant (Please Print)	Suzy E.P. FAKHR		
Beneficiary	Name AMAL AHMED SEMIRAMIS, CHAR; AND ASS	Street Address 1228 W. Farwell Ave	
	City	State ILLINOIS	
Point of Departure	Chicago O'Hare Airport	Destination	Trip to Be Made On ☐ One-Way ☒ Round Trip Ticket
Date of Departure	Premium $ 5.00	Personal Signature of Applicant	Suzy E.P. Fakhr

Countersigned by Resident Agent _____ By _____

The Fidelity and Casualty Company of New York

80 Maiden Lane · New York 38 · New York

(A Stock Company, hereinafter called the "Company")

In consideration of the payment of the premium and subject to the exceptions, limitations, reductions and other provisions of this policy, hereby insures the person whose name appears above as Applicant, hereinafter called the Insured, as follows:

1. INSURING CLAUSE: Ticket or Pass Requirement. The Company will pay the benefits specified below if during the term of this policy the Insured suffers loss resulting directly and independently of all other causes from accidental bodily injury (hereinafter referred to as "such injury"), sustained under circumstances specified below during the first one-way or round airline trip taken by the Insured after the purchase of this policy on Aircraft Operated by a Certificated Scheduled Air Carrier as defined below from the Point of Departure to the Destination, both shown above, and return if round trip ticket is obtained before departure, provided that at the time that the Insured sustains such injury he is traveling on a transportation ticket or pass covering the whole of said airline trip, issued to him for transportation on an aircraft operated by a certificated scheduled air carrier.

2. SUBSTITUTE TRIP COVERED IF TICKET EXCHANGED. In case of a change in the itinerary of said first airline trip referred to in Section 1 above, following the issuance of this policy, the insurance afforded as set forth in Section 1 above shall no longer apply on the original itinerary but shall apply on the new itinerary in the same manner and to the same extent as it would have applied on the original itinerary, provided that (1) the transportation ticket or pass issued to the Insured for said first airline trip has been exchanged for another ticket or pass issued for transportation on an aircraft operated by a certificated scheduled air carrier on the substituted trip, and (2) the Point of Departure is the same as that shown above, and (3) some portion of the trip covered by the substituted ticket or pass is the same as that covered by the ticket or pass for the first airline trip referred to in Section 1 above.

3. DEFINITION AND DELIMITATION OF COVERAGE. This policy applies only to such injury sustained by the Insured during such first or substituted airline trip referred to in Sections 1 and 2 above (a) while boarding, riding in or descending from or alighting from or coming in contact with aircraft operated by a certificated scheduled air carrier on a flight for which he (b) while riding in or on a land conveyance provided or arranged for, directly or indirectly, by such certificated scheduled air carrier or by the authority controlling such aircraft, except such conveyance charged for by the land carrier for the transportation of such carrier's passengers between the aircraft and the city such airport serves, preceding flight departure or following flight arrival at such airport, or for the transportation of passengers necessitated by an interruption or cancellation of such certificated scheduled air carrier's service prior to arrival at destination; or (c) while at an airport in the course of such first or substituted airline trip referred to in Sections 1 and 2 above; or (d) in consequence of crashing as the result of a forced landing of, accident to or disappearance of aircraft operated by a certificated scheduled air carrier in which the Insured is a passenger at the time of such forced landing, accident or disappearance. If within one year after such forced landing, accident or disappearance the Insured's body has not been found, it shall be presumed that he died as a result of accidental bodily injury occurring at the time of such forced landing or accident, or in the case of the disappearance of such aircraft, that he died at the time and place such aircraft was last seen or heard from and as the result of an accident to such aircraft.

This Policy is Non-renewable

Form ATC—2-56

SAMPLE

Name _____

To _____

Address _____

City _____ Zone _____

State or Province _____

DO NOT DISCARD THIS BROCHURE WHEN YOU ARE ABROAD

Appendix C.15

4. DEFINITION OF AIRCRAFT OPERATED BY A CERTIFICATED SCHEDULED AIR CARRIER. The words "Aircraft Operated by a Certificated Scheduled Air Carrier" as used in this policy, mean and are defined as follows: (1) aircraft of United States registry, operated on a regular, special or chartered flight by an air carrier holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board (or its successor) of the United States of America, under which it is authorized to engage in scheduled air transportation of passengers without limitation as to the specific maximum number of flights regularly permitted between single pairs of points in any calendar month; or (2) aircraft of foreign registry operated on a regular, special or chartered flight by an air carrier holding a certificate, license, or similar authorization for certificated scheduled air carrier transportation by the country of the aircraft's registry, and which in accordance therewith files, prints, maintains and publishes schedules and tariffs for regular passenger service between named cities at regular and specified times. Specifically excluded from the above definition of "Aircraft Operated by a Certificated Scheduled Air Carrier" are any and all aircraft operated by military airlines, whether or not engaged in scheduled air transportation, and any and all aircraft operated by air carriers which do not hold Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board (or its successor) of the United States of America, or in the case of foreign aircraft do not hold a similar authorization by the country of the aircraft's registry, and any and all aircraft operated by air carriers recognized, designated, licensed or determined by the governmental authority having jurisdiction over civil aviation as being Supplemental, Non-Certificated, Irregular or Non-Scheduled air carriers.

5. POLICY TERM. This insurance shall commence on the day and hour shown above and shall terminate either upon completion of the above-described airline trip or upon expiration of or surrender for refund or credit of, the transportation ticket hereinbefore referred to, but in no event shall this insurance extend beyond a period of twelve months.

6. BENEFITS. (a) Specific Loss Indemnity: If such injury within 100 days from the date of accident shall result in any one of the losses enumerated below, the Company will pay the sum set opposite such loss, but only one of the amounts so specified, the larger, will be paid for injuries resulting from one accident.

For Loss of Life or Both Hands or Both Feet or Sight of Both Eyes ..... The Principal Sum.
For Loss of One Hand and One Foot or Either Hand or Foot and Sight of One Eye ..... The Principal Sum.
For Loss of Either Hand or Foot or Sight of One Eye ..... One-Half The Principal Sum.

In no event shall the total amount payable for one or more of the above losses occurring within any fifteen-day period during the term of this policy exceed the Principal Sum.

Loss shall mean with regard to hands and feet actual severance through or above the wrist or ankle joints; with regard to eyes, entire and irrecoverable loss of sight.

(b) Medical Indemnity: If such injury shall require the services of a physician or surgeon, X-ray or laboratory technician, anesthetist, hospital, or a graduate nurse or nurses, the Company will pay, as it accrues, in addition to any other indemnity to which the Insured may be entitled, the actual expense of such services up to an amount not exceeding $375.00 for each $7,500.00 of Principal Sum, if same such service commences within 26 weeks after the date of the accident.

7. EXCLUSIONS. This insurance shall not cover death, dismemberment, loss of sight or other loss caused by disease (except any disease resulting directly from exposure due to forced landing); or by suicide or any attempt thereat, sane or insane; or by war or any act of war; nor shall it cover any pilot or other active member of the crew of any aircraft referred to herein.

8. POLICY PROVISIONS. Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions.

Notice of Claim: Written notice of claim must be given to the Company within twenty days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the Insured or the beneficiary to the Company at the office of its Air Travel Department, 141 Livingston St., Brooklyn 1, New York, or to any authorized agent of the Company, with information sufficient to identify the Insured, shall be deemed notice to the Company.

Claim Forms: The Company, upon receipt of a notice of claim, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within fifteen days after the giving of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and the extent of the loss for which claim is made.

Proofs of Loss: Written proof of loss must be furnished to the Company at its said office in case of claim for loss for which this policy provides payment within ninety days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.

Time of Payment of Claims: Indemnities payable under this policy will be paid immediately upon receipt of due written proof of loss.

Payment of Claims: Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provisions respecting such payment which may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the estate of the Insured. Any other accrued indemnities unpaid at the Insured's death may, at the option of the Company, be paid either to such beneficiary or to such estate. All other indemnities will be payable to the Insured.

Physical Examinations and Autopsy: The Company at its own expense shall have the right and opportunity to examine the person of the Insured when and as often as it may reasonably require during the pendency of a claim hereunder and to make an autopsy in case of death where it is not forbidden by law.

Legal Actions: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years (in Kansas, five years) after the time written proof of loss is required to be furnished.

Change of Beneficiary: The right to change of beneficiary is reserved to the Insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

Other Insurance in This Company: If other certificated scheduled air carrier (airline) trip policy or policies previously issued by this Company to the Insured be in force concurrently with this policy, making the aggregate indemnity for loss of life or dismemberment in excess of $75,000.00, the excess insurance shall be void and all premiums paid for such excess shall be returned to the Insured or to his estate.

Conformity with State Statutes: Any provision of this policy which, on its effective date, is in conflict with the statutes of the State in which the Insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

IN WITNESS WHEREOF, the Company has caused this policy to be signed by its President and Secretary and countersigned by its duly authorized agent, but it shall not be binding upon the Company unless the application is signed personally by the Applicant.

Secretary President

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No. 990

In the

Supreme Court of the United States

OCTOBER TERM, 1970

FIRST NATIONAL BANK OF CHICAGO, as Guardian of the Estates of AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors; AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors, by FIRST NATIONAL BANK OF CHICAGO, as Guardian of Their Estates,

Petitioners,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondent.

MOTION AND BRIEF IN SUPPORT OF MOTION TO STRIKE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. KENNELLY
Attorney for Petitioners

Of Counsel:
WILLIAM A. MOORMAN

The Scheffer Press, Inc.—ANdover 3-6850

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Respondent.

MOTION TO STRIKE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Now come the Petitioners and respectfully move the Court as follows:

I.

1. To strike that portion of the brief of The Fidelity and Casualty Company of New York at page 4 which asserts that the provisions of the policies of The Fidelity

and Casualty Company of New York and Continental Casualty Company were not identical insofar as this case is concerned. That portion reads in part as follows:

> Initially, it should be noted that, petitioner's contention to the contrary notwithstanding, those policies were not identical. Indeed petitioner itself equivocates in its position. At page 4 of its petition it states: "Both (policies) were identical in their terms and provisions." However, at page 6, it states that "they were *essentially* identical." *The fact is that they were materially different.* In contrast to the policy issued by respondent, the policy issued by Continental did *not* limit coverage to a scheduled itinerary by requiring that the insured be traveling upon a ticket or pass covering the entire airline trip.

2. That statement is false. The policies were *not* materially different. They were *not* different at all, insofar as this case is concerned.

3. The premium was the same, the application was the same, the beneficiaries were the same, the policy was the *same* insofar as this case is concerned. As to respondent's statement that its policy was "materially different," a reading of the provisions of both policies will show that this is false:

Fidelity and Casualty Company of New York Policy (Refused to Pay)	Continental Casualty Company Policy (Agreed to Pay)
The Company will pay the benefits specified below if during the term of this policy the Insured suffers loss resulting directly and independently of all other causes from accidental bodily injury (hereinafter referred to as "such injury"), sustained under circumstances specified below during the first one-way or round trip taken by the Insured after the purchase of this policy on Aircraft Operated by a Certified Scheduled Air Carrier as defined below from the Point of Departure to the Destination, both shown above, and return if round trip ticket is obtained before departure, *provided that at the time that the insured sustains such injury he is traveling on a transportation ticket or pass covering the whole of said airline trip, issued to him for transportation on an aircraft operated by a certificated scheduled air carrier.*	"Injury" wherever used herein means bodily injury caused by an accident resulting directly and independently of all other causes in loss covered by this policy and occurring during the first flight taken by the Insured from the Point of Departure to the Destination and the return flight from the Destination to the Point of Departure, on or after the Date of Policy Purchase; *provided a ticket for each such flight has been obtained prior to the initial flight from the Point of Departure* and further provided that such injury is sustained in consequence of riding as a passenger, and not as a pilot or crew member, on a scheduled airline flight.

It is clear that the exclusionary provisions were *the same insofar as this case is concerned.*

4. The other company paid *in full.*

5. The Fidelity and Casualty Company of New York refused to pay.

6. The U.S. District Court entered *summary judgment for plaintiff.* The Court of Appeals reversed and ordered *summary judgment for defendant.* There is no question but that the policies issued by the company which paid and the respondent company were the *same* as far as the exclusionary provisions, upon which the Court of Appeals based its opinion, are concerned. There likewise is no question but that the premium would have been the the same, if Mrs. Fakhri had merely purchased the ticket from Paris to Rabat before she left O'Hare Field, Chicago, *regardless* of whether she told the insurance clerk about the change. There is no question but that the premium is the same whether a person flies from Washington to New York, or from Washington to Singapore and back. There is absolutely *no* difference in the cost of the policy. The United States Court of Appeals did *not* even mention these undisputed *facts*, but instead took away a judgment for the five children of Mrs. Fakhri, granted by the U. S. District Judge.

This case involves a form of policy issued to hundreds of millions of travelers. Purchasers do *not* get copies of these policies. The exclusionary provisions are camouflaged and consist of unpunctuated sentences of over 200 words. Is this Court going to permit the United States Court of Appeals to render a precedent which binds children and other beneficiaries of both international and domestic air travelers from recoveries upon policies, based upon such hidden, unconscionable provisions — when this Court knows from its own experience and common sense

that purchasers do not receive copies of these policies and the policies are mailed immediately to the beneficiaries — and when this Court knows that the insurance premiums are the same regardless of the number of trips involved provided they occur within the time limit of the policy? In other words, here is a case where five minor children are deprived of the recovery of insurance which their mother bought for them, even though another company, with the identical policy, paid, and the respondent company did not.

The reason we make these assertions is in order that this Court will realize the significance of the respondent's blatantly false statement that the exclusionary clauses were "materially different" — when in fact they were identical insofar as this case is concerned.

7. The statement in the brief of respondent concerning such insurance policies is false and should be stricken.

II.

1. To strike that portion of the brief of The Fidelity and Casualty Company of New York which asserts that under Illinois Law Mrs. Fakhri's five children are not entitled to the proceeds from the insurance policy.

2. Fidelity and Casualty Company of New York asserts that the Court's decision in *Thompson* v. *Fidelity & Casualty Company of New York,* 16 Ill. App. 2d 159, 148 N.E. 2d 9, cert. den. 358 U.S. 837 (1958) represents the current law of Illinois and is controlling in this case.

This is not just another civil case involving just another insurance policy.

3. The Appellate Court of Illinois, Second Circuit (the same Circuit which decided *Thompson)* held, in 1966 in

Carlson v. *New York Life Insurance Company*, 76 Ill. App. 2d 187, 222 N.E. 2d 363, that an insurance policy is to be construed in the light of the *reasonable expectations* of the insured. The Court said at 222 N.E. 2d 368:

> We might indulge in extended rationalization to justify our interpretation of the insurance contract, but we prefer simply to state that the purpose of the insurance contract would be gravely thwarted if the clause with which we are concerned were read to exclude coverage ***. The policy must be construed in the light of the reasonable expectation and purpose of the ordinary man when making an ordinary contract. In the words of Dean Roscoe Pound, "The law enforces reasonable expectations arising out of conduct, relations and situations."

4. *Thompson* does not represent the current position of the Courts of Illinois in regard to the enforcement of exclusionary language contained in contracts of insurance.

5. Additionally, the Court of Appeals in *Thompson* was not asked to construe the insuring clause in its entirety, nor the substitute trip provision at all, but decided only the application of the requirement that passage be on a "scheduled airline."

6. That portion of respondent's brief which asserts that Illinois does not look to the "reasonable expectations" of the insured in interpreting insurance contracts and that *Thompson* is the controlling Illinois law is false and should be stricken.

Respectfully submitted,

JOHN J. KENNELLY
Attorney for Petitioners

Of Counsel:
WILLIAM A. MOORMAN

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 990

FIRST NATIONAL BANK OF CHICAGO, as Guardian of the Estates of AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors; AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors by FIRST NATIONAL BANK OF CHICAGO, as Guardian of Their Estates,

Petitioners,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondent.

BRIEF IN SUPPORT OF MOTION TO STRIKE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit that the brief of respondent, The Fidelity and Casualty Company of New York, be stricken.

I.

That portion of respondent's brief which asserts that the provisions of the Continental Casualty Company policy

were "materially different" from the provisions of The Fidelity and Casualty Company of New York's policy is false.

The premium for each policy was the same; the application for each policy was the same; the beneficiaries were the same; the insuring clause of both policies was the same, insofar as this case is concerned. However, respondent asserts that its insuring clause was "materially different" from the insuring clause in the Continental policy, which paid the full amount under its insurance policy. The Fidelity and Casualty Company of New York asserts that it has no similar obligation to pay.

The two insuring clauses are not "materially different." The *fact* is that the two insuring clauses contain *identical* provisions.

Fidelity and Casualty Company of New York Policy (Refused to Pay)

The Company will pay the benefits specified below if during the term of this policy the Insured suffers loss resulting directly and independently of all other causes from accidental bodily injury (hereinafter referred to as "such injury"), sustained under circumstances specified below during the first one-way or round trip taken by the Insured after the purchase of this policy on Aircraft Operated by a Certificated Scheduled Air Carrier as defined below from the Point of Departure to the Destination, both shown above, and return if round trip ticket is obtained before departure, *provided that at the time that the Insured sustains such injury he is traveling on a transportation ticket or pass covering the whole of said airline trip*, issued to him for transportation on an aircraft operated by a certificated scheduled air carrier.

Continental Casualty Company Policy (Agreed to Pay)

"Injury" wherever used herein means bodily injury caused by an accident resulting directly and independently of all other causes in loss covered by this policy and occurring during the first flight taken by the Insured from the Point of Departure to the Destination and the return flight from the Destination to the Point of Departure, on or after the date of Policy Purchase; *provided a ticket for each such flight has been obtained prior to the initial flight from the Point of Departure* and further provided that such injury is sustained in consequence of riding as a passenger, and not as a pilot or crew member, on a scheduled airline flight.

Contrary to The Fidelity and Casualty Company of New York's conclusion that on the basis of the above language

its policy provided *more limited* coverage than the policy of Continental Casualty Company, a reading of the two insuring clauses clearly indicates that The Fidelity and Casualty Company of New York's policy imposed no limitations beyond those contained in the policy of Continental Casualty Company — a company which paid in full.

Respondent has had 9 years in which to study the provisions of its policy and those of the policy of Continental Casualty Company. After 9 years of study, respondent has clearly been unable to determine just what its own insurance policy provides. How, then, can respondent assert that Mrs. Fakhri and her beneficiaries are bound by the terms of this insurance policy, when Mrs. Fakhri had but a few minutes to consider her policy? If the provisions of an insurance policy are unclear in their meaning to the insurer, how can they be less ambiguous to the insured?

The fundamental law of construction of insurance contracts is that all uncertainty should be resolved in favor of the insured. *Erickson* v. *Hospital Service Corp.*, 52 Ill. App. 2d 464, 202 N.E. 2d 147 (1964). An insurance policy should be construed most strongly in favor of the insured to the end that he will not be deprived of the benefit of insurance. *Howard* v. *Aetna Life Ins. Co.*, 329 Ill. App. 248, 67 N.E. 2d 878 (1946). If an insurance policy can be given any reasonable construction preventing defeat of insured's indemnification for loss covered by its general language, such construction will be adopted. *Hill* v. *Standard Mutual Casualty Co.*, 110 F.2d 1001 (7 Cir. 1940).

In *Sheffer* v. *Suburban Casualty Company*, 18 Ill. App. 2d 43, 151 N.E. 2d 429, at 430 (1958), the Court stated:

> It is a basic rule in the construction of language in insurance policies that it should be construed liberally in favor of the insured. Judge Otto Kerner in an

opinion in the Circuit Court of Appeals, 7th Cir. in interpreting Illinois law, discussed this principle in the case of *Hoffman* v. *Illinois Nat. Casualty Co.*, 139 F.2d 564, 565 as follows:

> Before discussing the provisions of the policy it is well to recall that the courts, rather uniformly and generally, have laid down the rule that insurance contracts must be construed liberally to the insured and should receive an interpretation consistent with the apparent object and plain intent of the parties . . .

This is not just another civil case involving just another insurance policy.

This case involves a form of policy issued to hundreds of millions of travelers. Purchasers do *not* get copies of these policies. The exclusionary provisions are camouflaged and consist of unpunctuated sentences of over 200 words. Is this Court going to permit the United States Court of Appeals to render a precedent which binds children and other beneficiaries of both international and domestic air travelers from recoveries upon policies, based upon such hidden, unconscionable provisions — when this Court knows from its own experience and common sense that purchasers do not receive copies of these policies and the policies are mailed immediately to the beneficiaries — and when this Court knows that the insurance premiums are the same regardless of the number of trips involved provided they occur within the time limit of the policy? In other words, here is a case where five minor children are deprived of the recovery of insurance which their mother bought for them, even though another company, with the identical policy, paid, and the respondent company did not.

The reason we make these assertions is in order that this Court will realize the significance of the respondent's

blatantly false statement that the exclusionary clauses were "materially different" — when in fact they were identical insofar as this case is concerned.

II.

Respondent asserts further, and falsely, in its brief that petitioners are urging this Court to adopt a position held only by the Courts of California, rather than the law of Illinois. Respondent in support of this assertion relies on the case *Thompson* v. *Fidelity & Casualty Company of New York*, 16 Ill. App. 2d 159, 148 N.E. 2d 9, cert. den. 358 U.S. 837 (1958), which it says represents the current law of Illinois. This statement is also erroneous.

In 1966 the Appellate Court of Illinois, Second District (the same District which decided *Thompson*), held that an insurance policy should be interpreted to effect the *reasonable expectations* of the insured. *Carlson* v. *New York Life Insurance Company*, 76 Ill. App. 2d 187, 222 N.E. 2d 363. That action involved a claim for disability benefits under an accident policy. The insurance policy there involved provided benefits only for specified losses caused by accidental bodily injury "resulting directly and independently of all other causes *** subject to the terms and conditions of this policy."

An identical provision appeared in the policy issued to Mrs. Fakhri by The Fidelity and Casualty Company of New York and also in the policy considered by the Court in *Thompson*. The Court in *Thompson* had said, in language relied upon by respondent, that the policy before the Court was simple, legible, and unambiguous.

It should be pointed out that in *Thompson* the Court was specifically considering only whether the requirement

that travel be on a "scheduled" aircraft was binding on the insured and his beneficiaries. However, it appears from the Thompson opinion that in 1958 the Court felt that all provisions should be binding.

Significantly, 8 years later, 1966, the same Court held that the above provision should not deprive the insured of coverage:

> We might indulge in extended rationalization to justify our interpretation of the insurance contract, but we prefer simply to state that the purpose of the insurance contract would be gravely thwarted if the clause with which we are concerned were read to exclude coverage ***. The policy must be construed in the light of the reasonable expectation and purpose of the ordinary man when making an ordinary contract. In the words of Dean Roscoe Pound, "The law enforces reasonable expectations arising out of conduct, relations and situations." 222 N.E. 2d 368.

It is clear that Illinois will no longer deprive beneficiaries and insureds of anticipated coverage solely because of the existence of hypertechnical exclusionary words contained in insurance policies. *Carlson* is indicative of a trend reflected in the decisions of Courts across the country. *This* decision represents the current law of Illinois.

Petitioners respectfully move this Court to strike the entire brief filed by respondent, The Fidelity and Casualty Company of New York, for the foregoing reasons, or in the alternative, that portion of its brief, quoted in the motion, which is false.

Respectfully submitted,

JOHN J. KENNELLY
Attorney for Petitioners

Of Counsel:
WILLIAM A. MOOSEMAN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 990.

FIRST NATIONAL BANK OF CHICAGO, AS GUARDIAN OF THE ESTATES OF AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI AND AZA FAKHRI, MINORS: AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI AND AZA FAKHRI, MINORS, BY FIRST NATIONAL BANK OF CHICAGO, AS GUARDIAN OF THEIR ESTATES,

Petitioners,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION,

Respondent.

ANSWER TO PETITIONERS' MOTION TO STRIKE.

Petitioners' motion is unjustified. That petitioners refuse to accept the facts and law as viewed by the Court of Appeals presents no basis for the charges made therein. All that is stated in respondent's brief is accurate.

The Charge That Respondent Has Made an Untrue Statement With Respect to the Terms of a Policy of Insurance That Is Not Involved in This Litigation.

Initially, it must be noted that petitioners' entire discussion of this charge is irrelevant. No Court of review would consider the action taken by an insurer not involved in the litigation before it, in its interpretation of the insurance policy sued upon.

However, respondent will make a brief response to the charge. The payment made by Continental Casualty Company is inexplicable. Respondent has no knowledge of what might have prompted that payment, but submits that it was not justified under its policy. The policy issued by Continental, just as the policy issued by respondent, allowed the insured to change his itinerary only upon certain conditions with which Mrs. Fakhri did not comply. Both policies intended to limit the insured to a single itinerary scheduled before departure. However, *this common intent is expressed in different terms.*

Continental's policy refers to "a ticket for each such flight". This might be interpreted as referring to the several separate flights which together constitute an itinerary and this might be construed as an ambiguous expression of the requirement that the insured adhere to a scheduled itinerary.

In contrast, the policy issued by respondent is unmistakable. It expressly states that the insured must be "traveling upon a transportation ticket or pass covering the whole of said airline trip" and it thereby explains the reason for the requirements of the "substitute trip" provision. The requirement therein that the ticket be exchanged for a ticket which covers part of the originally scheduled

itinerary assures the insured's adherence to his obligation to remain upon a single itinerary; any flight taken upon a ticket purchased after initial departure must necessarily, by virtue of its exchange for the original ticket, be a true "substitute trip".

Failing to comply with these requirements, Mrs. Fakhri abandoned the original itinerary and engaged in a series of separate trips unrelated to and not in furtherance thereof. If the Court had found that coverage existed under such circumstances, coverage would have been afforded for *each* of the unlimited separate trips which she might have taken before finally returning to Paris and undertaking to complete the originally scheduled itinerary.

In other words, although the intent of each policy may be basically the same, Fidelity & Casualty Company's policy is set forth in unmistakable terms. The rule that ambiguous contracts will be construed against the insurer could not be applied to the Fidelity & Casualty Company's policy; however, it may have prompted Continental to pay the claim. Indeed, respondent cannot imagine any other legitimate reason which would justify that payment.

It is in view of the foregoing that respondent stated and now reasserts that the policies are materially different. It is therefore apparent that the petitioners may have the right to argue that the policies are not materially different, but they have no right to charge respondents with having made untrue statements.

Respondent respectfully submits that petitioners' charge is a mere subterfuge designed to draw this Court's attention away from the only factors here relevant—the terms of the policy, the circumstances surrounding Mrs. Fakhri's death and the issue whether there is any reason why this Court should grant a *writ of certiorari*. Indeed petitioners

themselves support this statement. If petitioners honestly consider respondent's statement to be untrue, why didn't they object thereto in the Court of Appeals. In the reply brief filed therein, respondent made the identical analysis of Continental's policy:

> "In contrast to defendant's policy, the policy issued by Continental does not reflect the intent to limit coverage to a single scheduled itinerary by requiring that the insured be traveling upon a ticket or pass covering the entire airline trip." (Reply brief p. 8.)

Petitioners did not challenge that statement either by written word or upon oral argument; it is curious that they now choose to do so.

In view of the foregoing, respondent respectfully submits that petitioners' charge is unwarranted. Indeed it is a mere excuse for petitioners to exercise their demonstrated propensity to rely upon the irrelevant and prejudicial even when it is unfounded in the record. For instance, petitioners redundantly and repeatedly refer to their status as minors. This is not a matter of relevant concern. Indeed if the rights of the parties are to be judged on the basis of need, then petitioners should also refer to their extremely substantial guardianship estate presently pending in the Probate Division of the Circuit Court of Cook County under docket number 61 P 8345 (Confer: *Republic of Iraq v. First National Bank of Chicago*, 350 F. 2d 645, 1965, 7th Cir.).

Petitioners make frequent reference to the circumstances of the issuance of the policy and state as established fact that Mrs. Fakhri received the policy but no extra copy thereof. On the contrary, there is no evidence whatsoever in the record about the details of this transaction which occurred more than ten years ago and such details cannot be established by generalizing about a business custom

which varies according to time and place, as well as the practice of a particular insurer. *In Re Estate of Pohn*, 67 Ill. App. 2d 227, 214 N. E. 2d 553 (1966).

The Charge That Respondent Has Misstated the Law.

Apparently petitioners are inclined to loosely label as false all with which they disagree, because they even charge that respondent's interpretation of Illinois law is untrue. Respondent respectfully submits that this charge exceeds the bounds of advocacy. There is a real difference between erroneously construing the law and stating an untruth. Indeed, petitioners' charge is indirectly leveled against the Court of Appeals because that Court agreed with respondent's view of Illinois law. That Court stated:

> "Under Illinois law, which we are bound to follow in this case, the terms of a written contract determine the rights of the parties thereto. This applies also to flight insurance. See *Mutual of Omaha Insurance Co.* v. *Russell*, 402 F. 2d 339 (10th Cir. 1968); *Thompson* v. *Fidelity & Casualty Co. of New York*, 16 Ill. App. 2d 159, 148 N. E. 2d 9 (1958).
>
> "An insurance company has the right to limit coverage on a policy it issues and when it has done so, the plain language of the limitations must be effectuated. *Dreher* v. *Aetna Casualty & Surety Co.*, 83 Ill. App. 2d 141, 226 N. E. 2d 287 (1967); *Thompson* v. *Fidelity & Casualty Co. of N. Y., supra; Continental Casualty Co.* v. *Phoenix Construction Co.*, 46 Cal. 2d 423, 296 P. 2d 801 (1956); *Crosse* v. *Supreme Lodge Knights and Ladies of Honor*, 254 Ill. 80, 98 N. E. 2d 261 (1912)". (App. B-11.)

If an incorrect construction of the law is tantamount to the stating of an "untruth' then respondent must point out to this Court that the Court of Appeals correctly interpreted Illinois law. The applicable rule established by the Illinois Supreme Court is that a policy of insurance will

be enforced in accordance with its terms. The contract will not be rewritten by the Court. *Blume* v. *Pittsburgh Life & Trust Co.*, 263 Ill. 160, 104 N. E. 1031 (1914); *Crosse* v. *Supreme Lodge Knights & Ladies of Honor*, 254 Ill. 80, 98 N. E. 261 (1912); *Pioneer Insurance Co.* v. *Alliance Insurance Co.*, 374 Ill. 576, 590, 30 N. E. 2d 66 (1940); *Reiner* v. *St. Paul Fire & Marine Insurance Co.*, 106 Ill. App. 2d 210, 245 N. E. 2d 655 (1969).

The cases that support this proposition are legion. No Illinois decision, including the *Carlson* decision relied upon by petitioners, deviates therefrom. Indeed even if the *Carlson* Court did render a contrary ruling, such intermediate Court of review is not empowered to overrule the Illinois Supreme Court.

Additionally, the *Carlson* decision does not in fact adopt the rule espoused by petitioners. That Court interpreted an accident policy, different from the one before this Court, which provided benefits for loss "resulting directly, and independently of all other causes from accidental bodily injury." The question presented was whether this clause was to be interpreted as allowing recovery for any injury proximately caused by accident even if that injury had been caused in part by a preexisting condition and the Appellate Court expressly noted that its resolution required it to "interpret(e) the insurance contract." (76 Ill. App. 2d 196.) In interpreting that contract, the Court looked to its terms as reasonably intended by the parties.

In contrast, petitioners do not claim that the policy in the instant case is ambiguous and subject to a contrary interpretation. Rather they claim that the contract should be ignored and rewritten by the Court and this astounding proposal *is not* acceptable under Illinois law.

WHEREFORE, respondent respectfully prays that petitioners' motion be denied in its entirety and respectfully asks that petitioners' charges be stricken from the record.

Respectfully submitted,

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SUPREME COURT, U. S.
FILED
JAN 23 1971
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In the

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OCTOBER TERM, 1970

FIRST NATIONAL BANK OF CHICAGO, as Guardian of the Estates of AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors; AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors, by FIRST NATIONAL BANK OF CHICAGO, as Guardians of Their Estates,

Petitioners.

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondent.

MOTION TO STRIKE ANSWER OF THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, TO PETITIONERS' MOTION TO STRIKE

JOHN J. KENNELLY
Attorney for Petitioners

Of Counsel:
WILLIAM A. MOORMAN

The Schaffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 990

FIRST NATIONAL BANK OF CHICAGO, as Guardian of the Estates of AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors; AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors, by FIRST NATIONAL BANK OF CHICAGO, as Guardians of Their Estates,

Petitioners,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondent.

MOTION TO STRIKE ANSWER OF THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, TO PETITIONERS' MOTION TO STRIKE

We are reluctant to have to file another pleading in this Court. However, The Fidelity and Casualty Company of New York has now compounded its improper action. Initially it stated that the policy which was paid was "materially different" from its own policy. Now it devotes its brief not to showing that the policies are "materially different" but goes completely outside the record as follows: (a) on page 4 The Fidelity and Casualty Company of New York refers to "substantial guardianship estate pres-

ently pending in the Probate Division of the Circuit Court of Cook County under docket number 61 P 8345 (Confer: Republic of Iraq v. First National Bank of Chicago, 350 F.2d 645, 1965, 7th Cir.)"; and (b) it refers to the "oral argument" before the United States Court of Appeals and baldly states that Petitioners did not challenge defendant insurance company's claim to the effect that the policies were different. That statement is false. The brief of plaintiffs-appellees, filed in the United States Court of Appeals clearly pointed out that the policies were the same, insofar as this case is concerned.

It is indeed astounding for a national insurance company to make a statement in the United States Supreme Court concerning the size of the guardianship estate of the five children of Suzy Fakhri, and to refer to a docket number of the Probate Court of Cook County, Illinois—as though this Court should now order the file of the Probate Court and determine the assets of the minor children, and employ that irrelevant material as a basis for denying them the benefits of the policy of insurance purchased for them by their mother.

Wherefore, petitioners respectfully move this Honorable Court to strike the answer of defendant insurance company to petitioners' motion to strike.

Respectfully submitted,

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FR 2-5464
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